No. 92-638

Supreme Court, U.S.
FILED
OCT 08 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL FUNDING INSTITUTE, INC.,
AMERICAN CITIZENS FOR POLITICAL ACTION
and ROBERT A. DOLAN, As Treasurer,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

DAVID M. KOPSTEIN
(Counsel of Record)
DROSS & LEVENSTEIN
1747 Pennsylvania Ave., N.W.
Suite 875
Washington, D.C. 20006
(202) 296-7032

Counsel for Petitioners

Of Counsel:

GEORGE B. DRIESEN
ZWERDLING, PAUL, LEIBIG
KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

QUESTIONS PRESENTED

1. Whether the government may constitutionally condition access to information it has made available to the public on the information not being used or sold to solicit funds for political purposes.

2. Whether a restriction on the right to solicit funds for political purposes must be subjected to strict First Amendment scrutiny.

LIST OF PARTIES

The parties below were International Funding Institute, Inc., American Citizens for Political Action, and Robert A. Dolan, as treasurer. Neither International Funding Institute, Inc. nor American Citizens for Political Action has any parent or subsidiary entities.

Legi-Tech, Inc. participated below as an *amicus curiae*. Legi-Tech, Inc. is a subsidiary of McClatchy Newspapers, Inc., a newspaper company that has issued shares to the public.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	1
JURISDICTIONAL STATEMENT	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING WRIT	6
I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER CONGRESS' RIGHT TO CONDITION CASH SUBSIDIES ON THE RECIPIENTS' REFRAINING FROM EXERCISING FREE SPEECH RIGHTS ALSO APPLIES TO THE USE OF PUBLIC INFORMATION THE GOVERNMENT COLLECTS	6
II. THE D.C. CIRCUIT'S DECISION IS CONTRARY TO PREVIOUS DECISIONS BY THIS COURT AND BY THE SUPREME COURT OF MISSOURI	7
A. The Decision Below Conflicts With *Smith v. Daily Mail Publishing Co.*'s Holding that Restrictions Upon the Publication of Government-Collected Information Must be Justified by a Compelling Governmental Interest	7
B. The Decision Below Conflicts With This Court's Decisions Forbidding Content-Based Restrictions on Free Speech	11
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
Buckley v. Valeo, 424 U.S. 1 (1976)	3,10
Burson v. Freeman, 112 S.Ct. 1846 (1992)	12-13
California Medical Association v. FEC, 453 U.S. 182 (1981)	4
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)	7
Federal Election Commission v. International Funding Institute, Inc., 969 F.2d 1110 (D.C. Cir. 1992)	*passim*
Florida Star v. B.J.F., 491 U.S. 524 (1989)	8
International Society for Krishna Consciousness v. Lee, 112 S.Ct. 2701 (1992)	10
International Society for Krishna Consciousness v. Lee, 112 S.Ct. 2711 (1992)	13
Landmark Communications, Inc. v. Virginia, 434 U.S. 829 (1978)	7
Meyer v. Grant, 486 U.S. 414 (1988)	11
Oklahoma Publishing Co. v. District Court, 4430 U.S. 308 (1977)	7
Perry v. Sinderman, 408 U.S. 593 (1972)	8-9
Regan v. Taxation With Representation of Washington, 461 U.S. 540 (1983)	6,7
Regan v. Time, Inc., 468 U.S. 641 (1984)	12
Rust v. Sullivan, 111 S.Ct. 1759 (1991)	6,7
Ryan v. Kirkpatrick, 669 S.W.2d 215 (Mo. 1984)	11
Seattle Times v. Rhinehart, 467 U.S. 20 (1984)	7
Smith v. Daily Mail Publishing Co., 443 U.S. 97 (1979)	7-10
Speiser v. Randall, 357 U.S. 513 (1958)	9

Table of Authorities Continued

	Page
United States v. Kokinda, 110 S.Ct. 3115 (1990) ..	13
Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)	10
Statutes	
Federal Election Campaign Act of 1971	
2 U.S.C. § 431(13)(A)	3
2 U.S.C. § 437h	2,4
2 U.S.C. § 438(a)(4)	*passim*
2 U.S.C. § 438(b)(3)(A)	3
Supreme Court Case Selections Act, P.L. No. 100-352, 102 Stat. 662 (1988)	2
Legislative History	
117 Cong. Rec. 30057, col. 3 (1971)	3
H.R. Rep. No. 660, 100th Cong., 2d Sess., *reprinted in* 1988 U.S. Code Cong. & Ad. News 766 ...	2
Law Review Article	
Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1413 (1989)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

INTERNATIONAL FUNDING INSTITUTE, INC.,
AMERICAN CITIZENS FOR POLITICAL ACTION,
and ROBERT A. DOLAN, AS TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners International Funding Institute, Inc., American Citizens for Political Action, and Robert A. Dolan, as treasurer pray that a writ of certiorari issue to review the *en banc* decision of the United States Court of Appeals for the District of Columbia Circuit entered on July 10, 1992.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the District of Columbia Circuit (a majority opinion and three concurring opinions) are reported in *Federal Election Commission v. International Funding Institute, Inc.*, 969 F.2d 1110 (D.C. Cir. 1992) (*en*

banc) and are reprinted in the Appendix at pp. 1a, *et seq.*.[1]

JURISDICTIONAL STATEMENT

The decision below answered a constitutional question certified by the United States District Court for the District of Columbia pursuant to 2 U.S.C. § 437h, a provision of the Federal Election Campaign Act. The Court of Appeals issued an Order directing the Clerk to withhold issuance of the Court's mandate through October 9, 1992. This Court has jurisdiction to review that decision pursuant to 28 U.S.C. § 1254(1).[2]

STATUTE INVOLVED

This case involves 2 U.S.C. § 438(a)(4), which is set forth at App. 40a.

STATEMENT OF THE CASE

The Federal Election Campaign Act requires political committees receiving contributions to report to

---

[1] Subsequent references to the Appendix are designated as "App. ___."

[2] As originally enacted, § 437h provided for an appeal as of right to this Court of all decisions on constitutional questions arising thereunder. Effective, June 27, 1988, however, § 437h was amended as part of the Supreme Court Case Selections Act, P.L. No. 100-352, 102 Stat. 662 (1988), to delete the paragraph granting an appeal as of right to this Court. The legislative history of this amendment indicates that, while denying an appeal *as of right* to this Court under these circumstances, Congress nevertheless intended "to convert these types of cases to review by certiorari." H.R. Rep. No. 660, 100th Cong., 2d Sess. 7, *reprinted in* 1988 U.S. Code Cong. & Ad. News 766, 772.

the Federal Election Commission the name address, occupation and employer of all persons (other than political committees) who contribute more than $200 within a calendar year. 2 U.S.C. §§ 431(13)(A), 438(b)(3)(A).[3] The Act further requires that the Commission then "make the reports . . . filed with it available for inspection and copying commencing as soon as practicable. . . ." 2 U.S.C. § 438(a)(4).

The Act contains no restrictions regarding the use of the information made public under § 438(a)(4), except the following:

> . . . .Provided, That any information copied from such reports . . . shall not be sold or utilized by any person for the purpose of soliciting contributions or for any commercial purpose.

2 U.S.C. § 438(a)(4).

The legislative history of the soliciting-or-sale restriction in § 438(a)(4) is sparse but straight forward. It originated as an amendment sponsored by Senator Bellmon, who stated that its purpose was to protect the privacy of political contributors. 117 Cong. Rec. 30057, col. 3 (1971). No other purpose of the soliciting-or-sale restriction ever was mentioned in Congress.

Petitioner American Citizens for Political Action ("ACPA") is a Political Action Committee. Its purpose is to advance a conservative political agenda and, toward that end, it endeavors (among other things) to seek out like-minded individuals, solicit their fi-

---

[3] This provision was examined and found to be Constitutional in *Buckley v. Valeo*, 424 U.S. 1 (1976).

nancial support, and direct that support toward candidates considered to be sympathetic to ACPA's agenda. Petitioner Robert Dolan ("Dolan") is the Chairman and Treasurer of ACPA.

The Commission brought an enforcement action in the United States District Court for the District of Columbia alleging that ACPA and Dolan violated § 438(a)(4) by directing written solicitations to persons whose names and addresses were known to have been derived from a certain list of "Active Republican Donors" compiled from reports filed with the Commission and made public pursuant to § 438(a)(4). The Commission further alleged that Petitioner International Funding Institute, Inc. ("IFI"), a political and managerial consulting firm that also is run by Dolan, violated § 438(a)(4) by selling information derived from the Active Republican Donors list, through a list broker, to ACPA and other unnamed entities who used it for political solicitations.

Defendants moved to dismiss the complaint pursuant to F.R.Civ.P. 12(b)(6) on the ground that § 438(a)(4) was unconstitutional. Shortly thereafter, the Commission amended its Complaint to seek a declaratory judgment pursuant to 2 U.S.C. § 437h.[4] The defendants then renewed their Rule 12(b)(6) motion.

The District Court then certified to the D.C. Circuit, *en banc*:

---

[4] This is the first case in which the Federal Election Commission has invoked § 437h and it has, ironically, chosen to do so in an enforcement action. In *California Medical Association v. FEC*, 453 U.S. 182 (1981), the Commission argued to this Court that it was both unlawful and improper to invoke § 437h in these circumstances.

> Do the provisions of 2 U.S.C. § 438(a)(4) which prohibit the sale or use of individual information copied from reports filed with the Commission for the purpose of soliciting contributions or for commercial purposes violate the First Amendment of the Constitution of the United States, either on their face or as applied to the defendants' conduct.

The D.C. Circuit answered the certified question in the negative. Three of the judges wrote separate concurring opinions. The Court's opinion first decided that the soliciting-or-sale restriction in § 438(a)(4) did not actually restrict Defendants' political solicitation activities because Defendants would not have had access to any of the reported information in the first place absent § 438(a)(4). Accordingly, the Court reasoned that the soliciting-or-sale restriction was not subject to "strict scrutiny" and was, at most, subject to "intermediate scrutiny."

The Court then decided that the soliciting-or-sale restriction was justified by the government's interest, as proffered by the Commission, in protecting the commercial value to the reporting entities of the contributor lists. Neither the Commission nor the Court below cited any evidence that Congress adopted the restriction for that purpose.

In a separate concurring opinion, Judge Ruth Bader Ginsburg emphasized that the restriction did not discriminate on the basis of viewpoint and that Petitioners remained free to engage in political solicitations without the aid of lists filed with the Commission.

Judge Edwards stated that he concurred in the result reached by the majority and in Judge Ruth Bader Ginsburg's concurring opinion.

Judge Buckley concurred on the ground that a restriction on the use of a list does not directly restrict free speech.

Judge Randolph expressed the opinion that under the First Amendment, the solicitation-or-sale restriction would not survive even intermediate scrutiny. He nonetheless concurred in the result reached by the Court because he saw this case as involving only a restriction on the right to use the private property of the entities compiling the lists.

REASONS FOR GRANTING WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER CONGRESS' RIGHT TO CONDITION CASH SUBSIDIES ON THE RECIPIENTS' REFRAINING FROM EXERCISING FREE SPEECH RIGHTS ALSO APPLIES TO THE USE OF PUBLIC INFORMATION THE GOVERNMENT COLLECTS

This case presents an important question concerning the scope of this Court's holding in two recent cases, *Regan v. Taxation With Representation of Washington*, 461 U.S. 540 (1983) and *Rust v. Sullivan*, 111 S.Ct. 1759 (1991).

In *Regan*, this Court considered the constitutionality of a provision of the tax code denying tax-exempt status to organizations engaged in lobbying. Noting that "[d]eductible contributions are similar to cash grants" (461 U.S. at 544), this Court concluded that "Congress chose not to subsidize lobbying as extensively as it chose to subsidize other activities. . . ." *Id.*

In *Rust*, a 5-4 majority of this Court extended its holding in *Regan* to recognize the right of the government to restrict the uses to which its funds are put by prohibiting abortion counseling at federally funded clinics.

Underlying the holding below is the implicit assumption that the information disclosed pursuant to §438(a)(4) was, in effect, a government subsidy upon which Congress was free to impose conditions such as the solicitation-or-sale restriction. In support of this view, the D.C. Circuit relied primarily upon the holdings of this Court in *Regan* and *Rust*.[5]

The assumption that the government may constitutionally condition in this manner the use of public information it collects and disseminates runs headlong into this Court's decision in *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979). In *Daily Mail*, this Court struck down a statute prohibiting the publication of names of juvenile offenders. In reviewing previous decisions involving similar issues in *Landmark Communications, Inc. v. Virginia*, 434 U.S. 829 (1978), *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) the Court observed that:

---

[5] *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984), another case cited by the D.C. Circuit, did not involve the constitutionality of restrictions on the use of public information. In upholding a court's right to restrict the uses of information obtained in civil pretrial discovery, the Court noted that pretrial discovery proceedings are not a traditionally public source of information. Unlike the public dissemination mandated by §438(a)(4), information disclosed during pretrial discovery is intended to be disclosed only to the opposing party.

> These cases involved situations where the government itself provided or made possible press access to the information. That factor is not controlling.

443 U.S. at 103.

The view that restrictions on the publication of information contained in public records cannot be imposed except for compelling reasons was reaffirmed in *Florida Star v. B.J.F.*, 491 U.S. 524 (1989), where the Court affirmed the right of a newspaper to publish with impunity the name of a rape victim who had been identified *inadvertently* in a public police report.

Daily Mail and its progeny make clear that a government decision to place information in the public domain cannot be considered a public "subsidy" that may be subject to whatever selective use restrictions the government considers "reasonable."

There is an urgent need to define the constitutional limits of the "conditional benefit" doctrine. The majority in *Rust* acknowledged that in some circumstances the government's right to control the uses of its property must yield to First Amendment concerns. 111 S.Ct. at 1776. Indeed, this Court long ago recognized that:

> . . . even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially

> his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly."

Perry v. Sinderman, 408 U.S. 593, 597 (1972), quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

Even prior to *Rust*, this Court's decisions regarding unconstitutional conditions were described as "a minefield to be traversed gingerly." Sullivan, *Unconstitutional Conditions*, 102 Harv. L.Rev. 1413, 1415-16 (1989). In his dissenting opinion in *Rust*, Justice Blackmun called this "a troubled area of our jurisprudence." 111 S.Ct. at 1779. It is, therefore, not surprising that the D.C. Circuit's struggle to articulate a basis for applying the "conditional benefit" doctrine in this case generated four separate opinions.

This Court should grant *certiorari* in order to determine the scope of Congress' right, announced in *Regan* and *Rust*, to condition benefits upon the recipient's refraining from exercising First Amendment rights.

II. THE D.C. CIRCUIT'S DECISION IS CONTRARY TO PREVIOUS DECISIONS BY THIS COURT AND BY THE SUPREME COURT OF MISSOURI

A. The Decision Below Conflicts With *Smith v. Daily Mail Publishing Co.*'s Holding that Restrictions Upon the Publication of Government—Collected Information Must be Justified by a Compelling Governmental Interest.

This Court has noted that "the constitutional guarantee [of free speech] has its fullest and most urgent

application precisely to the conduct of campaigns for public office." *Buckley v. Valeo*, *supra*, 424 U.S. at 14-15. The Court also has recognized that the act of soliciting funds from the public for various causes is itself within the protection of the First Amendment. *International Society for Krishna Consciousness v. Lee*, 112 S.Ct. 2701 (1992); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980). Both of these First Amendment freedoms are implicated in this case. Accordingly, in considering the constitutionality of the soliciting-or-sale restriction, the court below should have applied the most rigorous standard, requiring, among other things, a showing that the restriction serves a compelling governmental interest. *Buckley v. Valeo*, *supra*, 424 U.S. at 25.

Section 438(a)(4) requires political committees to report to the government certain valuable information that the reporting entities would not otherwise disclose. The statute further makes that information public. The D.C. Circuit reasoned that, because the government provided access to the information in the first place, "the Act cannot be said in any sensible way to infringe upon the defendants' first amendment right to solicit contributions for a political cause." 969 F.2d at 1113. Because it considered the soliciting-or-sale restriction to be a conditionally-bestowed "government benefit," the Court refused to subject the restriction to more than intermediate scrutiny.

As stated above, this Court's holding in *Smith v. Daily Mail Publishing Co.*, *supra*, requires that restrictions on the publication of public information must withstand *strict* scrutiny, whether or not the government itself made the information public. Accordingly,

the solicitation-or-sale restriction could be upheld only if it could survive strict scrutiny.[6]

The Supreme Court of Missouri also has read this Court's cases to hold that only a compelling interest may justify restrictions on the use of government collected information for political purposes.

In *Ryan v. Kirkpatrick*, 669 S.W.2d 215 (Mo. 1984) (*en banc*), the Supreme Court of Missouri sustained a First Amendment challenge to a substantially identical restriction in that state's Campaign Finance Disclosure Act. When challenged, the State sought to justify the restriction by arguing that the restriction was necessary to prevent potential contributors from being discouraged from contributing (as the Commission argued below) and to protect their privacy. Relying on decisions of this Court commanding strict scrutiny in this area, the Court found that "no compelling reason" had been advanced in support of the restriction and, accordingly, declared it to be constitutionally invalid.

This Court should grant *certiorari* to resolve the evident conflict between its decisions and the decision of the Court below. The *Ryan* decision makes plain that the conflict is real and needs to be resolved.

B. The Decision Below Conflicts With This Court's Decisions Forbidding Content-Based Restrictions on Free Speech.

A second reason why the solicitation-or-sale restriction should have been subjected to strict scrutiny is

---

[6] In the area of political speech, this Court considers the burden of surviving strict scrutiny to be "well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 425 (1988).

because it is a content-based restriction on protected speech.

In *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) this Court stated that "[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." Any restriction on speech which, like the soliciting-or-sale restriction, is based upon the *purpose* of the speech necessarily discriminates on the basis of its content. *Id.*

It is irrelevant that a prohibition such as the soliciting-or-sale restriction applies to all solicitations without regard to the solicitor's political viewpoint. Such a prohibition is, nevertheless, a facially content-based restriction on protected speech. *Burson v. Freeman*, 112 S.Ct. 1846 (1992). In *Burson*, this Court held that a Tenneesee law establishing a campaign-free zone by prohibiting all political solicitations within 100 feet of polling places had to be justified by a *compelling* state interest. The Court stated:

> The Tennessee restriction under consideration, however, is not a facially content-neutral time, place or manner restriction. Whether individuals may exercise their free-speech rights near polling places depends entirely on whether their speech is related to a political campaign. * * * This Court has held that the First Amendment's hostility to content-based regulation extends not only to a restriction on a particular viewpoint, but also to a prohibition of public discussion of an entire topic.

Id. at 1850. More recently, in considering the validity of a regulation prohibiting solicitation at an airport under certain circumstances, Justice Kennedy stated:

> If the Port Authority's solicitation regulation prohibited all speech which requested the contribution of funds, I would conclude that it was a direct, content-based restriction of speech in clear violation of the First Amendment.

International Society for Krishna Consciousness v. Lee, 112 S.Ct. 2711, 2721 (1992) (Kennedy, J., concurring).[7]

Contrary to *Burson*, the court below reasoned that the soliciting-or-sale restriction is not a content-based prohibition because it applies without regard to viewpoint. Consequently, the court applied only intermediate scrutiny.

This Court should grant *certiorari* to clarify when a restriction on speech is "content-based," even though it is neutral as to viewpoint.

---

[7] In *United States v. Kokinda*, 110 S.Ct. 3115 (1990), Justice Brennan observed in his dissenting opinion that:

> [a regulation prohibiting solicitation] is not content neutral; indeed it is tied explicitly to the content of the speech. If a person . . . says to members of the public, "Please support my advocacy group," he cannot be punished. If he says, "Please contribute $10," he is subject to criminal prosecution. His punishment depends entirely on what he says.

Id. at 3134.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court grant *certiorari* to review the decision below.

Respectfully submitted,

DAVID M. KOPSTEIN
DROSS & LEVENSTEIN
1747 Pennsylvania Ave., N.W.
Suite 875
Washington, D.C. 20006
(202) 296-7032

Counsel for Petitioners

Of Counsel:
GEORGE DRIESEN
ZWERDLING, PAUL, LEIBIG
KAHN, THOMPSON & DRIESEN
1025 Connecticut Ave., N.W.
Suite 307
Washington, D.C. 20036
(202) 857-5000

APPENDIX

TABLE OF CONTENTS

	Page
Opinion and Order of the D.C. Circuit in *Federal Election Commission v. International Funding Institute*, No. 91-5013 (July 10, 1992)	1a
Order of August 5, 1992 Amending Opinion	22a
Order of July 28, 1992 Witholding Issuance of Mandate	24a
District Court's Order Certifying Constitutional Question and Findings of Fact to the Court of Appeals (January 25, 1991)	26a
District Court's Memorandum Opinion and Order Denying Motion to Alter or Amend Certification Order (October 23, 1991)	34a
2 U.S.C. § 438(a)(4)	40a

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *En Banc* April 29, 1992

Decided July 10, 1992

No. 91-5013

FEDERAL ELECTION COMMISSION, PLAINTIFF

v.

INTERNATIONAL FUNDING INSTITUTE, INC., *et al.*, DEFENDANTS

On Certification from the United States
District Court for the District of Columbia

(Civil Action No. 90-01623)

Richard B. Bader, Associate General Counsel, Federal Election Commission, with whom *Lawrence Noble,* General Counsel, and *Vivien Clair,* Attorney, were on the brief, for plaintiff.

David M. Kopstein for defendants.

Thomas J. Casey and *Richard L. Brusca* were on the brief for *amicus curiae* Legi-Tech, Inc. *Roberto Iraola* and *Andrew L. Sandler* also entered appearances for *amicus.*

Before MIKVA, *Chief Judge,* WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* D. H. GINSBURG.

Concurring opinion filed by *Circuit Judge* RUTH B. GINSBURG, in which *Circuit Judge* EDWARDS joins.

Concurring opinion filed by *Circuit Judge* EDWARDS.

Concurring opinion filed by *Circuit Judge* BUCKLEY.

Concurring opinion filed by *Circuit Judge* RANDOLPH.

D. H. GINSBURG, *Circuit Judge*: The Federal Election Commission filed suit against the International Funding Institute, Inc., American Citizens for Political Action, Inc., and Robert Dolan (as treasurer of ACPA), alleging that the defendants violated the Federal Election Campaign Act, 2 U.S.C. § 438(a)(4), which provides that the list of contributors that a political committee must place on file with the FEC may not be sold or used by anyone else to solicit contributions or for a commercial purpose. The defendants moved to dismiss, arguing that the use restriction of § 438(a)(4) is unconstitutional, both on its face and as applied to their conduct, because it infringes upon their first amendment right to solicit contributions for a political cause.

The district court certified the constitutional question directly to this court en banc, as required by 2 U.S.C. § 437h. *FEC v. International Funding Inst.,* C.A. No. 90-1623, Order Certifying Constitutional Question and Findings of Fact to the Court of Appeals (D.D.C. Jan. 25, 1991). We hold that the use restriction in § 438(a)(4) is subject to at most an intermediate level of scrutiny for consistency with the first amendment, and that it serves an important governmental interest and is no broader than necessary to serve that interest. Accordingly, we hold that the statute is constitutional on its face and as applied to the defendants' conduct.

I. Background

The Federal Election Campaign Act, 2 U.S.C. §§ 431-455, requires each political committee periodically to report to the FEC the name and mailing address of each "person . . . who makes a contribution to the reporting committee . . . [aggregating $200 or more] within the calendar year." *Id.* § 434(b)(3)(A). Section 438(a)(4) directs the FEC to make those reports

> available for public inspection, and copying except that any information copied from such reports . . . may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes .... A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors ....

In 1986 IFI (through Dolan, its sole stockholder, director, and officer) subscribed to Campaign Contribution Tracking System, a commercial on-line data base service provided by amicus Legi-Tech, Inc., that compiles information from the political committee disclosure reports that the FEC makes public under § 438(a)(4). Using that information as its sole source, IFI developed a mailing list entitled "Active Republican Donors." IFI then contracted to market that list through a list broker who in turn rented the list to approximately five customers — including ACPA (through Dolan, its chairman and treasurer). ACPA used the list to conduct five test mailings, each of which solicited contributions from approximately 5000 persons whose names appear on the list.

Based upon these facts, the FEC determined that there was probable cause to believe that IFI, ACPA, and Dolan had knowingly and willfully violated § 438(a)(4). After trying to settle the matter, the Commission brought this suit in the district court. The defendants moved to dismiss, arguing that the statute is unconstitutional on its face and as applied to their conduct, and the district court certified to us the following question:

> Do the provisions of 2 U.S.C. § 438(a)(4) which prohibit the sale or use of individual information copied from reports filed with the Commission for the purpose of soliciting contributions or for commercial purposes violate the First Amendment of the Constitution of the United States, either on their face or as applied to the defendants' conduct?

For the reasons set out below, we answer that question in the negative.

II. The Level of Scrutiny

The defendants argue that the use restriction of § 438(a)(4) is subject to strict scrutiny because it is a direct infringement upon activity protected by the first amendment, or, in the alternative, because it prohibits speech in a way that is not content-neutral. The FEC (which asserts that § 438(a)(4) would withstand strict scrutiny) argues that it is subject only to intermediate scrutiny, in part because the statute regulates commercial speech, which is entitled to less protection than political speech. We think that neither party has it quite right.

The defendants' primary argument here is that soliciting contributions for a political cause is protected first amendment activity, *United States v. Kokinda,* 110 S. Ct. 3115, 3118 (1990), and "[s]tatutory restrictions on such conduct are ... 'always subject to exacting judicial review,'" quoting *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 294 (1981). The implicit premise of this argument is that the FECA in some way infringes upon the defendants' right to solicit contributions for a political cause. But that is not at all the case.

Prior to enactment of the FECA, the defendants had no right even to inspect another political committee's list of contributors. Section 438(a)(4) grants the defendants (and the public) access to the contributor list of another political committee, but at the same time the statute restricts their use of such a list. In no way does § 438(a)(4) impose any new burden upon the defendants, however. Rather,

the statute simply leaves undisturbed a pre-existing barrier to the defendants' use of another committee's list to solicit contributions: In order for the defendants to use the list to solicit, they must, as before the passage of the FECA, obtain the other committee's permission, perhaps at a price. Thus, the Act cannot be said in any sensible way to infringe upon the defendants' first amendment right to solicit contributions for a political cause. *See Regan v. Taxation With Representation,* 461 U.S. 540, 549-50 (1983) ("Although government may not place obstacles in the path of a [person's] exercise of ... freedom of [speech], it need not remove those obstacles not of its own creation") (quoting *Harris v. McRae,* 448 U.S. 297, 316 (1980)) (alterations in original); *see also id.* at 549 ("a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right"); *Cammarano v. United States,* 358 U.S. 498, 515 (1959) (Douglas, J., concurring) (rejecting the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State").

The defendants are in a position similar to that of the newspaper in *Seattle Times Co. v. Rhinehart,* 467 U.S. 20 (1984), which challenged a trial court order prohibiting it from publishing certain information that it had obtained through civil discovery. In part because the newspaper in that case had obtained the information "pursuant to a court order that both granted [the newspaper] access to that information and placed restraints on the way in which the information might be used," the Supreme Court rejected the newspaper's claim that the use restriction was subject to strict scrutiny. *Id.* at 32. Instead, the Court applied intermediate scrutiny, requiring only that the restriction further "an important or substantial governmental interest unrelated to the suppression of expression" and be "no greater than is necessary or essential to the protection of the particular governmental interest involved." *Id.* (quoting *Procunier v. Martinez,* 416 U.S. 396, 413 (1974), overruled in part by *Thornburgh v. Abbott,* 490 U.S. 401 (1989)).

Both in *Seattle Times* and here, the Government compelled disclosure of information for a particular purpose and prohibited use of that information for other purposes; like the newspaper in *Seattle Times,* the defendants here have no claim of right to the benefit of the compelled disclosure apart from the measure in which the concomitant use restriction is found. Because the defendants had no pre-existing right to use another committee's contributor lists to solicit contributions, we do not believe that the use restriction of § 438(a)(4) directly restricts the defendants' first amendment right to solicit contributions for a political cause. We hold therefore that § 438(a)(4) is not subject to strict scrutiny upon the first ground asserted by the defendants.*

The defendants appear to argue as a fall-back position that even if § 438(a)(4) does not newly restrict their ability to solicit contributions, it should still be scrutinized strictly because it "selectively prohibits solicitation" and is therefore "not content-neutral." *See Regan v. Time, Inc.,* 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). The defendants do not contend — nor could they — that § 438(a)(4) is anything but neutral as to the views for which it bars soliciting contributions. Instead, they argue that by providing the public with access to an inexpensive source of names, the Act in effect facilitates

---

*Notwithstanding Judge Randolph's implication, concurring op. at 2, we do not think that the Court's overruling of *Procunier v. Martinez,* 416 U.S. 396 (1974) in *Thornburgh v. Abbott,* 490 U.S. 401 (1989) undermines the *Seattle Times* decision. Both *Martinez* and *Abbott* involved restrictions on the mail privileges of prison inmates, the former applying intermediate scrutiny to one such restriction and the latter applying a species of rational basis scrutiny; in contrast, *Seattle Times* involved a protective order entered in the discovery phase of a civil trial. Although the Court in *Seattle Times* quoted *Martinez* for the precise verbal formulation of the intermediate scrutiny standard, the Court did not rely upon *Martinez* in deciding that the protective order before it was subject to intermediate scrutiny.

all forms of political speech except (and in that limited sense "selectively prohibits") the solicitation of contributions: Under § 438(a)(4), the defendants may use another committee's list to seek popular support for a particular policy, or to solicit signatures on a petition, or to urge recipients not to contribute to a rival cause, but they may not use the list to solicit contributions. Under the implementing regulation promulgated by the FEC, they may even publish information from another committee's list "in newspapers, books, magazines or other similar communications . . . as long as the principal purpose of such communication is not to communicate any contributor information listed on such reports for the purpose of soliciting contributions or for other commercial purposes." 11 C.F.R. § 104.15(c).

This argument comes down to the proposition that, if the Government facilitates some type of speech, then its decision not to facilitate another, related type of speech is subject to strict scrutiny. Yet just last Term in *Rust v. Sullivan,* 111 S. Ct. 1759, 1773 (1991), the Supreme Court expressly repudiated the notion that the first amendment requires "that if the government chooses to subsidize one protected right, it must subsidize analogous counterpart rights." Indeed, the Supreme Court has consistently given less than strict scrutiny to statutes that promote one, but not another closely related, first amendment activity. *See id.* at 1771-76 (rejecting first amendment challenge to restriction on abortion counselling at federally funded health clinics without reference to a "compelling government interest" or "narrow tailoring"); *Taxation With Representation,* 461 U.S. at 549 (statute that denies tax benefit to non-profit organization that engages in lobbying "is not subject to strict scrutiny"); *see also FCC v. League of Women Voters,* 468 U.S. 364, 380 (1984) (applying intermediate scrutiny to ban on editorials by federally funded public broadcasting stations, although relying more upon the nature of the broadcast medium than upon the regulatory scheme to determine the level of scrutiny).

We note also that the Supreme Court has consistently scrutinized more closely statutes that condition the

receipt of a government benefit upon the recipient's altering its independently funded activities, *see, e.g., id.* at 400 (statute prohibiting all editorializing on public broadcasting station that receives any public funds); *Speiser v. Randall,* 357 U.S. 513 (1958) (state property tax exemption conditioned upon signing loyalty oath), than it scrutinizes statutes that restrict only the use to which the recipient may put the government benefit, *see, e.g., Rust v. Sullivan,* 111 S. Ct. at 1775 n.5 (clinic receiving federal funds may establish separate, privately funded clinic to engage in abortion counselling); *Taxation With Representation,* 461 U.S. at 544 (non-profit corporation may retain tax benefit by using separate entity for lobbying); *cf. Harris,* 448 U.S. at 317 n.19 (government need not pay for abortion for a Medicaid-recipient, but "[a] substantial constitutional question would arise if Congress had attempted to withhold all Medicaid benefits from an otherwise eligible candidate simply because that candidate had exercised her constitutionally protected freedom to terminate her pregnancy by abortion"). The use restriction of § 438(a)(4) fits neatly within the latter category; it in no way restricts anything but the use to which one may put the compulsorily disclosed list of a political committee.

Alternatively, the defendants' brief may be read to argue that whenever the government makes information available for some purposes but forbids the use of that information for other purposes, the use restriction is, by its very nature, not content-neutral and therefore must be subject to strict scrutiny. But, as we have already seen, it is not true that every use restriction is subject to strict scrutiny: In *Seattle Times* the Supreme Court applied only intermediate scrutiny to a restriction on the use of information that the government had commanded to be disclosed. *See* 467 U.S. at 32. For the foregoing reasons, we reject the defendants' arguments that we should scrutinize § 438(a)(4) strictly.

What level of scrutiny does apply, then? We pointed out above that in *Seattle Times* the Court applied intermediate scrutiny to a court order similar in important respects

to § 438(a)(4). The exact level of less than strict scrutiny that the Court applied in *Taxation With Representation* and *Rust v. Sullivan* — which also involved restrictions analogous to § 438(a)(4) — is less clear, however. In those cases the Court apparently held that so long as the purpose of a statute is not to "suppress[ ] ... dangerous ideas," *Rust v. Sullivan,* 111 S. Ct. at 1772 (quoting *Cammarano,* 358 U.S. at 513); *Taxation With Representation,* 461 U.S. at 550 (quoting same), it is constitutional if it has a rational basis, *see Rust v. Sullivan,* 111 S. Ct. at 1771-76 (no mention of an "important" or "substantial" government interest); *Taxation With Representation,* 461 U.S. at 544-46 (same); *see also id.* at 550 ("It is not irrational for Congress to decide that tax-exempt charities such as TWR should not further benefit at the expense of taxpayers at large by obtaining a further subsidy for lobbying").

There may thus be a conflict between *Seattle Times,* on the one hand, and *Rust v. Sullivan* and *Taxation With Representation,* on the other. We need not join that issue today, however, because we conclude, for the reasons set out below, that the statute passes muster even under the more demanding standard. Therefore, we assume (but do not decide) that the use restriction of § 438(a)(4) is subject to intermediate scrutiny.

III. The Government Interest

The FEC asserts that the use restriction of § 438(a)(4) is narrowly drafted to advance two important governmental interests. First, the FEC argues that, as can be seen from the face of the statute, § 438(a)(4) protects a political committee against losing the economic value of its contributor list merely because it must publicly disclose the list. Second, relying upon legislative history, the FEC argues that the statute is intended to protect contributors from unwanted solicitation. *See National Republican Congressional Comm. v. Legi-Tech Corp.,* 795 F.2d 190, 192-93 (D.C. Cir. 1986) (recounting legislative history). We begin,

of course, with the statute itself, recurring to the legislative history only if necessary.

The district court found as a fact that a "political committee's contributor lists are its most valuable assets," the product of "time-consuming, labor-intensive activities that can cost a political committee thousands, even millions, of dollars." *See also id.* at 191 ("NRCC's . . . principal business asset is its list of donors, created through an expensive and laborious process of targeting and soliciting likely contributors"). Therefore, political committees "safeguard the confidentiality of their contributor lists" and disclose them to the public only under the compulsion of the Act. The district court also found that the economic value of a contributor list would be reduced if a competing fundraiser were able to obtain the list and to use it to solicit contributions. *See also National Ass'n of Retired Fed. Employees v. Horner,* 879 F.2d 873, 878 (D.C. Cir. 1989) ("business people will not overlook an opportunity to get cheaply from the Government what otherwise comes dearly, a list of qualified prospects"). Thus, the use restriction of § 438(a)(4) protects against that diminution of value by preserving for the compiling committee the exclusive right to use its contributor list to solicit contributions, a right that the compiling committee would but for the Act have protected simply by keeping the list secret.

The FEC does not argue solely that § 438(a)(4) protects the value of a political committee's intellectual property for its own sake, although that interest alone might qualify as "substantial." *See San Francisco Arts & Athletics v. United States Olympic Comm.,* 483 U.S. 522, 537-39 (1987) (substantial governmental interest in granting the USOC, a private corporation, exclusive right to use the word "Olympic"); *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1003-04 (1984) (trade secret is property right protected by takings clause); *cf. San Francisco Arts & Athletics,* 483 U.S. at 541 (a party has no "First Amendment right to 'appropriat[e] to itself the harvest of those who have sown' ") (quoting *International News Serv. v. Associ-*

ated Press, 248 U.S. 215, 239-40 (1918)) (alteration in original). In addition the FEC argues that by protecting the economic value of such contributor lists, the use restriction of § 438(a)(4) preserves political discourse at its pre-Act level.

The Commission's point is well-taken. Without the use restriction of § 438(a)(4), innumerable entrepreneurs would, like the defendants here, be able freely to appropriate to themselves part of the value of the contributor lists compiled by reporting political committees. As a result, such committees would have less incentive to compile the lists in the first place. In other words, if the return on their investment in solicitation would be reduced by others using the resulting lists, political committees would not find it worthwhile to solicit as much as they now do; they would raise less money, spend less money, and correspondingly underwrite less political discourse. *Cf. Buckley v. Valeo,* 424 U.S. 1, 19 (1976) (statutory limit on campaign spending "necessarily reduces the quantity of [political] expression ... because virtually every means of communicating ideas in today's mass society requires the expenditure of money"). The FEC thus argues persuasively that, far from discouraging political discourse, the use restriction of § 438(a)(4) "helps to preserve the viability of the system of private financing of elections." That is, the use restriction protects political discourse from the adverse effect that the disclosure requirement of the Act would otherwise have.*

---

*Judge Randolph suggests that the governmental interest discussed in the text cannot withstand intermediate scrutiny because it is "not supported by any legislative factual findings." Concurring op. at 2. It appears, however, that a restriction on first amendment activity occasioning intermediate scrutiny need not be supported by such a finding: In *Seattle Times* the Court upheld a restriction on free expression subject to intermediate scrutiny without demanding empirical support for the premise that underlay the restriction. *See* 467 U.S. at 31-36. Perhaps the Court does not require such support for the very reason that, as Judge Randolph states, "[t]he accuracy of legislative judgments giving rise to free speech claims is not, as a general matter, readily susceptible to empirical demonstration," concurring op. at 2.

The defendants do not take issue with the FEC's assertion that the use restriction of § 438(a)(4) promotes political discourse; nor are they so fond as to argue that preserving political discourse is not an important governmental interest. Rather, they argue that a political committee has no cognizable property right in the contributor list it creates because a list of names and addresses is not sufficiently original to warrant protection under the Copyright Act. *See Feist Publications v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1296-97 (1991).

Assuming that a political committee's contributor list is not subject to protection under the Copyright Act, however, it does not follow that the use restriction in § 438(a)(4) is invalid. The protection afforded to a political committee by § 438(a)(4) is not a copyright: The information in the report submitted by a political committee may freely be copied, published, and with one exception, used in any way. Indeed, the Congress enacted § 438(a)(4) not pursuant to its constitutional power to "secur[e] for limited Times to Authors ... the exclusive Right to their respective Writings," U.S. Const. art. I, § 8, cl. 8, which is subject to the requirement of originality, *see Feist Publications,* 111 S. Ct. at 1288, but to its power to regulate federal elections, U.S. Const. art. I, § 4, cl. 1. *See Buckley v. Valeo,* 424 U.S. at 13 & n.16; S. Rep. No. 229, 92nd Cong., 1st Sess. 99 (1971). In exercising the latter power, the Congress may recognize an intellectual property interest, narrower than copyright, that is not subject to the constitutional requirement of originality. *Cf. San Francisco Arts & Athletics,* 483 U.S. at 539-40 (upholding congressional grant of trademark-like protection to the USOC for the word "Olympic" even though it exceeds traditional boundaries of trademark protection).

Alternatively, viewing the use restriction of § 438(a)(4) as a non-copyright species of intellectual property, the defendants argue that it is inconsistent with the first amendment: "Under our system of government," they say, "no person has a property interest in the political sympathies of another." Clearly, however, § 438(a)(4) does not

create a "property interest in the political sympathies of another." Rather, it narrowly protects the value of the list itself in a particular use; it does not prevent one from soliciting a person who is on a committee's contributor list, so long as one does not obtain that person's name (directly or indirectly) from a list filed with the FEC.

IV. Conclusion

Section 438(a)(4) advances an important governmental interest, *viz.* in reserving the value of a contributor list to the political committee that creates it, and is no broader than is necessary to that task. Therefore, even if intermediate scrutiny is appropriate, § 438(a)(4) is not unconstitutional as applied to the defendants' conduct. We need not reach the FEC's alternative argument, bolstered by legislative history, that the governmental interest in protecting contributors from unwanted solicitations is sufficient to withstand intermediate scrutiny.

The defendants' facial challenge to § 438(a)(4) can succeed only if the statute may "never be applied in a valid manner" or is "written so broadly that [it] may inhibit the constitutionally protected speech of third parties." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 11 (1988). Because the statute may constitutionally be applied to the defendants' conduct, and the defendants do not argue that the statute is written so broadly that it will chill the protected speech of third parties, we also reject their facial challenge to § 438(a)(4).

Without further ado we remand the case to the district court for proceedings consistent with this opinion.

So ordered.

RUTH B. GINSBURG, *Circuit Judge,* joined by HARRY T. EDWARDS, *Circuit Judge, concurring in the court's opinion*: I agree, for reasons well stated in the court's opinion, that the First Amendment does not instruct the judiciary to disturb Congress' sensible and amply justified design. To emphasize two points, however, I add this separate statement. First, the provision challenged here does not differentiate on the basis of the solicitor's *viewpoint.* Second, whatever formula one uses to describe the appropriate "level of scrutiny," decisionmakers in all three branches of government should be alert to this reality: taxing and spending decisions — even those that might appear to offer the individual "a choice" or to leave her "no worse off" than she would have been absent government involvement — *can* seriously interfere with the exercise of constitutional freedoms. *See, e.g., FCC v. League of Women Voters,* 468 U.S. 364, 400-01 (1984) (Congress may not impose blanket requirement that every station receiving Corporation for Public Broadcasting funding refrain from editorializing); *cf. City of Cleburne v. Cleburne Living Center, Inc.,* 473 U.S. 432, 451-52 (1985) (Stevens, J., concurring) (Court's equal protection decisions "reflect a continuum of judgmental responses to differing classifications" rather than three discrete "tiers" of scrutiny).

Government actions of the character we review in this case are most troublesome — and in greatest need of justification — when distinctions are drawn based on the point of view a speaker espouses or when a benefit is provided contingent on an individual's relinquishing a civil right. *See, e.g., United States v. Kokinda,* 110 S. Ct. 3115, 3124-25 (1990) (plurality opinion); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 811-12 (1985); *Speiser v. Randall,* 357 U.S. 513 (1958). This case entails neither of these problematic elements. Although the defendants here repeatedly assert that § 438(a)(4) is antagonistic to certain First Amendment activity — *i.e.,* solicitation, they *do not* contend that the challenged provision was intended to favor or has the effect of favoring a

particular speaker or set of ideas. Nor are they able credibly to portray the statute as one that impels political committees and others to desist from enlisting the financial assistance of their fellow citizens.

Section 438(a)(4) does not condition access to FEC contributor lists by ACPA and other fund seekers on their abstaining from solicitation altogether, nor even does it inhibit them from contacting the very individuals whose names appear on the FEC lists they inspect (so long as solicitees' names are obtained from an independent source). The prescription properly ranks with the arrangement upheld by the Court in *Regan v. Taxation with Representation,* 461 U.S. 540, 544 (1981) (bifurcated statutory regime allows charitable corporation to receive tax deductible contributions if it confines lobbying activity to separate entity that receives nondeductible contributions), and does not exact a "penalty" for the exercise of a constitutional right. *See, e.g., Perry v. Sindermann,* 408 U.S. 593, 597 (1972); *see also Harris v. McRae,* 448 U.S. 297, 317 n.19 (1980) (although government need not fund abortion, "substantial constitutional question" would arise if government were to "withhold *all* Medicaid benefits" from a woman who terminated her pregnancy by abortion (emphasis supplied)).

Defendants do not assert that the Commission, in its role as clearinghouse for donor lists, hulks so large that potential or pre-existing channels for obtaining contributor information have been, as a practical matter, sealed off. *See, e.g., Frost & Frost Trucking v. Railroad Comm'n,* 271 U.S. 583 (1926). To the contrary, it is evident that IFI may still obtain names of potential contributors in each of two familiar ways: by itself undertaking the effort or by purchasing a list from a seller who has done the sweat work.

EDWARDS, *Circuit Judge*, concurring in the result.

I concur in the result reached by the majority and in the separate concurring opinion of Judge RUTH B. GINSBURG.

BUCKLEY, *Circuit Judge, concurring*: In my view, this case involves property, not speech. The International Funding Institute ("IFI") seeks the uncompensated use of lists of names and addresses compiled at considerable cost by private parties. The Federal Election Campaign Act, however, recognizes that those lists have economic value, and it protects the reporting committees' exclusive proprietary interest in them by forbidding their use by third parties "for the purpose of soliciting contributions or for commercial purposes." 2 U.S.C. § 438(a)(4).

The protection afforded the committees in this manner does not interfere with IFI's freedom of speech. Moreover, an elementary respect for property and a fair reading of the First Amendment suggest that IFI has no more right to convert such a list to its own commercial uses than Thomas Jefferson would have had to steal the quill from which he fashioned the pen with which he wrote the Declaration of Independence. A list of names and addresses has no more direct a relationship to speech than a goose feather had to the Declaration. Each can be put to uses that may facilitate the production of speech; neither is speech itself.

At some point, the link between speech and an alleged restraint on expression becomes too tenuous to support a constitutional claim. IFI would have us extend the reach of the First Amendment beyond reason when it asks us to sanction what would otherwise be an act of piracy. By forbidding its appropriation of the lists for its own commercial purposes, the statute protects the reporting committees' proprietary interests against unwarranted infringement.

I agree with Judge Randolph that treating the lists as property provides reason enough to find section 438(a)(4) constitutional. It is on this basis that I concur in the majority's judgment.

RANDOLPH, *Circuit Judge, concurring in the judgment*: The trichotomy of strict, intermediate and rational-basis scrutiny with its judicial ranking of "compelling," "important," and "legitimate" governmental interests, a trichotomy devised in equal protection cases, seems to me out of place when it comes to analyzing issues concerning the freedom of speech. To be sure, in *Simon & Schuster, Inc. v. New York State Crime Victims Board,* 112 S. Ct. 501 (1991), the Court used Fourteenth Amendment "compelling interest" language to decide a First Amendment case. *See also Austin v. Michigan State Chamber of Commerce,* 494 U.S. 652, 657 (1990). This prompted Justice Kennedy to examine the extension's evolution, only to discover that the Court had "adopted this formulation in First Amendment cases by accident rather than as the result of a considered judgment." *Id.* at 513 (Kennedy, J., concurring); *see also Burson v. Freeman,* 112 S. Ct. 1846, 1850 n.3 (1992) (plurality opinion); *id.* at 4399 (Kennedy, J., concurring). The intermediate standard of review, created for gender discrimination cases in *Craig v. Boren,* 429 U.S. 190 (1976), is another matter. The Court has done little more than flirt with the idea of applying it to First Amendment claims. The controlling opinion in *Barnes v. Glen Theatres, Inc.,* 111 S. Ct. 2456, 2461 (1991), offered a variant of intermediate scrutiny to decide whether nude dancing is entitled to First Amendment protection, but that view commanded only three votes. *See id.* at 2467-68 (Scalia, J., concurring in the judgment). A majority of the court embarked on an intermediate scrutiny course with respect to free speech rights of prisoners in *Procunier v. Martinez,* 416 U.S. 396, 413 (1974), thereafter quoted portions of *Procunier* with approval in *Seattle Times Co. v. Rinehart,* 467 U.S. 20, 32 (1984), and then retreated in *Thornburgh v. Abbott,* 490 U.S. 401, 408-14 (1989). *Regan v. Taxation with Representation,* 461 U.S. 540 (1983), did not even flirt with the idea. Then-Justice Rehnquist's opinion for the Court sustained, against a First Amendment challenge, Congress' refusal to allow organizations engaging in substantial lobbying to remain eligible for tax deductible contributions on the basis that

it was "not irrational" for Congress to have made the distinctions that it did. *Id.* at 550; *see also International Soc'y for Krishna Consciousness, Inc.* v. *Rumbaugh,* 60 U.S.L.W. 4749, 4752 (U.S. June 26, 1992).

At all events, I doubt that the majority in this case truly means to apply the sort of intermediate scrutiny employed in the context of the Fourteenth Amendment. In such cases, courts have required that statutory classifications have factual support. *Cf. Burlington Northern R.R. v. Ford,* 60 U.S.L.W. 4513, 4515 (U.S. June 9, 1992). The government must prove that the means chosen are "substantially related" to achieving "important" governmental objectives. *See, e.g., Craig v. Boren,* 429 U.S. at 197; *Metro Broadcasting, Inc. v. FCC,* 110 S. Ct. 2997, 3008-09 (1990). Without empirical support, the provision will not survive. That is the point of now-Justice Thomas' opinion for this court in *Lamprecht v. FCC,* 958 F.2d 382 (D.C. Cir. 1992). I doubt whether such stringent requirements of proof, although an integral part of intermediate scrutiny, can or should be transplanted into the First Amendment area. The accuracy of legislative judgments giving rise to free speech claims is not, as a general matter, readily susceptible to empirical demonstration. *Cf. Burson v. Freeman,* 112 S. Ct. at 1856 (plurality opinion).

The majority's opinion does not convince me that the proviso limiting 2 U.S.C. § 438(a)(4) could survive such stringent analysis. A last-minute floor amendment passed with limited discussion (*see* 117 CONG. REC. 30,057-58 (1971)), the proviso was not supported by any legislative factual findings. The Federal Election Commission has not filled the void in its presentation to us. The record contains no factual support for my colleagues' assumption that the proviso will increase the overall level of speech. Maj. op. at 11. Allowing others to use contributor lists may reduce the return on a political committee's investment in developing them. But we cannot be certain of this and still less can we say how much the proviso will reduce that return. If others were free to exploit the lists, the developers might increase their level of speech in order

to remain the contributor's exclusive object. From the standpoint of the contributors, they might be subjected to more solicitations from others competing for their dollars, which is to say that there would be more speech without the proviso than with it. We simply do not know the true effect of the proviso and, from all that appears, neither did Congress. Under the usual intermediate scrutiny review, such uncertainty would lead to unconstitutionality.

Nonetheless, I agree with the result my colleagues reach. The case seems to me rather easy. As both the majority opinion and Judge Ruth B. Ginsburg's concurring opinion discuss, the proviso neither directly limits the ability of citizens to speak nor conditions the receipt of a government benefit on the waiver of the right to speak. Nor does it place restrictions on the use of information the government itself has generated and released to the public. The proviso simply restricts a citizen's right to use another's property (here, the contributor lists), property to which no one other than the owner has any separate, independent claim. *Compare Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 81 (1980); *Lloyd Corp. v. Tanner,* 407 U.S. 551 (1972). In this respect, it is akin to the protection the Freedom of Information Act gives to trade secrets and other privileged or confidential information (5 U.S.C. § 552(b)(4)) and the trade secret protection some states accord customer lists. R. MILGRIM, MILGRIM ON TRADE SECRETS § 2.09[7][a][1], at 2-253 & n.281 (1992). It is certainly "not irrational" for Congress to extend similar protection to a political committee's contributor lists. If the government forced political committees to disclose their lists to the public without imposing any restrictions on how the lists might be used, this might constitute a taking under the Fifth Amendment. *Cf. Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1011-12 & n.5 (1984). The proviso preserves the property, avoids a taking, encourages compliance with the disclosure laws by removing an incentive to disobey them, and arguably enhances speech by allowing political committees to reap the full benefit

of their labors. For its part, the defendant International Funding Institute did not have "a First Amendment right to 'appropriat[e] to itself the harvest of those who have sown.'" *San Francisco Arts & Athletics v. United States Olympic Comm.*, 483 U.S. 522, 541 (1987) (quoting *International News Serv. v. The Associated Press*, 248 U.S. 215, 239-40 (1918)). The proviso draws a line "to assure the due protection" of the rights of private property owners and the interests of citizens in learning the identity of contributors. *Lloyd Corp.*, 407 U.S. at 570. The accommodation thus made, while perhaps not constitutionally compelled, is constitutionally permissible.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1991

No. 91-5013

Federal Election Commission,

Plaintiff

v.

International Funding Institute, Inc., et al.,

Defendants

United States Court of Appeals
For the District of Columbia Circuit

FILED AUG 05 1992

CONSTANCE L. DUPRE
CLERK

Before: MIKVA, Chief Judge, WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, Circuit Judges.

ORDER

It is ORDERED by the Court, sua sponte, that the Opinion for the Court filed by Circuit Judge D. H. Ginsburg on July 10, 1992, be amended as follows:

Page 13, first full paragraph, last line: Delete the phrase "withstand intermediate scrutiny" and substitute "withstand scrutiny under the first amendment."

Per Curiam
For the Court:

/s/ Constance L. Dupre
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1991
CA 90-01623

No. 91-5013

Federal Election Commission,

Plaintiff

v.

International Funding Institute, Inc.l, et al.

Defendants

United States Court of Appeals
For the District of Columbia Circuit

FILED JUL 28 1992

CONSTANCE L. DUPRE
CLERK

ORDER

Upon consideration of defendants' unopposed Motion to Stay Issuance of Mandate or Otherwise Delay Effective Date of Decision Pending Disposition of Petition for Writ of Certiorari, it is

ORDERED that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate through October 9, 1992.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CA NO. 90-1623 (RCL)

FEDERAL ELECTION COMMISSION,
Plaintiff

v.

INTERNATIONAL FUNDING INSTITUTE, INC., *et al.*,
Defendants.

FILED

JAN 25 1991

Clerk, U.S. District Court
District of Columbia

CERTIFICATION ORDER

ORDER CERTIFYING CONSTITUTIONAL QUESTION AND FINDINGS OF FACT TO THE COURT OF APPEALS

This cause came before the Court on plaintiff's motion to amend complaint, plaintiff's proposed amended complaint and plaintiff's motion to certify the question of the constitutionality of 2 U.S.C. § 438(a)(4) to the Court of Appeals for its *en banc* consideration, and on defendants response thereto;

It is hereby ORDERED that

1. Plaintiff's Motion to Amend Complaint is GRANTED and the proposed Amended Complaint is deemed filed;

2. Defendants' renewed Motion to Dismiss is deemed filed in response to the Amended Complaint, but plaintiff need not file any response thereto at this time.

The Court hereby certifies, pursuant to 2 U.S.C. § 437h, to the Court of Appeals for the District of Columbia the following question:

> Do the provisions of 2 U.S.C. § 438(a)(4) which prohibit the sale or use of individual information copied from reports filed with the Commission for the purpose of soliciting contributions or for commercial purposes violate the First Amendment of the Constitution of the United States, either on their face or as applied to the defendants' conduct?

THE COURT FURTHER CERTIFIES the following Findings of Fact, proposed by the plaintiff and substantively unopposed by the defendants:

The Parties

1. Plaintiff Federal Election Commission ("FEC" or "Commission") is the independent agency of the United States government with exclusive primary jurisdiction over the administration, interpretation, and civil enforcement of the Federal Election Campaign Act of 1971, as amended (the "Act"), codified at 2 U.S.C. §§ 431-455. *See generally* 2 U.S.C. §§ 437c(b)(1), 437d(a), and 437g. The Commission is authorized to institute investigations of possible violations of the Act, 2 U.S.C. §§ 437g(a)(1) and (a)(2); to initiate civil actions in the United States district courts to obtain judicial enforcement of the Act, 2 U.S.C. §§ 437c(b)(1) and 437d(e); and to initiate actions in the federal courts to construe the constitutionality of any provision of the Act, 2 U.S.C. § 437h.

2. International Funding Institute, Inc. ("IFI"), is a for-profit corporation organized under the laws of the Commonwealth of Virginia on April 15, 1986.

3. IFI is a political and managerial consulting firm that engages in fundraising, advertising, public relations, marketing, and other commercial activities.

4. IFI transacts business in and has its principal place of business in the District of Columbia.

5. American Citizens for Political Action, Inc. ("ACPA"), is a political committee within the meaning of 2 U.S.C. § 431(4) and is registered with the Commission pursuant to 2 U.S.C. § 433(a).

6. ACPA maintains an office in and does business in the District of Columbia.

7. Robert E. Dolan ("Dolan") is both Chairman and Treasurer of ACPA. He also is IFI's sole director, officer, and stockholder.

Background

8. The Act requires political committees to report the "identification" of each person (other than a political committee) who makes contributions to the reporting committee within the calendar year in an aggregate amount or value in excess of $200. *See* 2 U.S.C. § 434(b)(3)(A).

9. In the case of an individual contributor, the Act defines "identification" to mean the individual's name, mailing address, occupation, and the name of the individual's employer. *See* 2 U.S.C. § 431(13)(A).

10. The Act requires the Commission to make all reports and statements filed with the Commission available for public inspection and copying, at the expense of the person requesting such copying, within 48 hours of the Commission's receipt of those documents. *See* 2 U.S.C. § 438(a)(4).

11. Political committees make their contributor lists available to the Commission for public inspection and copying only under compulsion of law.

12. Section 438(a)(4) of the Act prohibits any person from selling or using for solicitation or commercial purposes information copied from reports filed with the FEC, other than using the name and address of a political committee to solicit contributions from that committee. To protect against the illegal use of contributors' names and addresses, the same provision allows a reporting political committee to submit 10 pseudonyms in each report it files.

13. A political committee's contributor lists are its most valuable assets.

14. The development and the updating of a political committee's contributor lists are time-consuming, laborintensive activities that can cost a political committee thousands, even millions, of dollars.

15. With the exception of the mandatory FEC filing of their contributor lists, political committees safeguard the confidentiality of their lists and make them available only for purposes and by groups whom the committees expressly authorize.

16. To raise funds or to enlarge their lists, some political committees selectively rent, sell, or exchange part or all of their contributor lists or mailing lists.

17. The Commission has long recognized the economic value of contributor lists, mailing lists, and membership lists, and the existence of a market in such lists. *See, e.g.*, FEC Advisory Opinions 1979-18, 1981-11, 1981-53, and 1982-41; 11 C.F.R. § 100.7(a)(1)(iii)(A).

18. Fundraising is a competitive business and depends heavily for its success on identifying persons who not only agree with the fundraising organization's goals but who have discretionary income with which to make donations. Any unauthorized use of a political committee's contributor lists for commercial or solicitation purposes therefore reduces the value of the lists to the political committee as fundraising tools.

Activities of IFI, ACPA, and Dolan

19. On May 22, 1986, Robert E. Dolan, as Executive Vice-President of IFI, entered into written agreements with Washington On-Line, a service of Legi-Tech, Inc., to subscribe to an on-line computer data base offered by Washington On-Line entitled "Campaign Contribution Tracking System" ("CCTS").

20. IFI incurred total costs of $4,750 for its subscription to the CCTS data base and paid at least $3,500 of this amount to Washington On-Line.

21. The CCTS data base contained individual contributor information compiled from the disclosure reports made available by the Commission for public inspection and copying pursuant to 2 U.S.C. 438(a)(4).

22. The CCTS Subscription Agreement with IFI included a provision entitled "Lawful Use," which stated: You understand that information included in the Campaign Contribution Tracking System has been copied by us from reports filed with the Federal Election Commission. It is a violation of federal law to sell or use information copied from such reports for the purpose of soliciting contributions from other than political committees.

23. IFI contracted with several computer contractors to develop the information obtained by IFI from the CCTS data base into mailing lists entitled "Active Republican Donors" and "Active Democrat Donors."

24. The "Active Republican Donors" list contained individual contributor information, including the contributor's name and street address, compiled from the disclosure reports made available by the Commission for public inspection and copying pursuant to 2 U.S.C. § 438(a)(4).

25. The sole source of the names on the "Active Republican Donors" list was the CCTS.

26. During September 1986, Dolan, as an agent for IFI, contacted The Best Lists, Inc., a list brokerage company, and requested that it market the "Active Republican Donors" list for profit on behalf of IFI.

27. The Best Lists, Inc., rented the "Active Republican Donors" list for a fee to approximately five different organizations, including ACPA.

28. The "Active Republican Donors" list was used for solicitation purposes by at least four of the five or so organizations that contracted to rent the list.

29. The Best Lists, Inc., retained a commission for brokering the "Active Republican Donors" list to each organization and forwarded the remainder of the fee paid by each organization to IFI as earned income.

30. Between on or about December 8, 1986, and on or about March 2, 1987, The Best Lists, Inc., forwarded to IFI approximately $9,513 in income generated by the rental of information from the "Active Republican Donors" list.

31. ACPA and Robert E. Dolan, as Chairman or Treasurer, rented the "Active Republican Donors" list from The Best Lists, Inc., at a cost of at least $1,711.

32. Response Dynamics, a company that conducts fundraising on behalf of ACPA and Dolan, as Treasurer of ACPA, conducted five test mailings of approximately 5,000 names and addresses each to individual contributors from the "Active Republican Donors" list. Each mailing solicited contributions to ACPA. ACPA and Dolan, as Chairman or Treasurer, netted an average gain of approximately $740 from these solicitations.

Administrative Proceedings

33. Two sworn, signed administrative complaints filed pursuant to 2 U.S.C. § 437g(a)(1) stated that ACPA sent solicitation letters, signed by Robert E. Dolan, to addresses of pseudonyms authorized by the Act to be in-

cluded in political committee reports. One of the complainants further stated that ACPA and Dolan "have obtained telephone numbers of individuals listed on [the complainant's] reports filed with the Commission and have made telephone solicitations of a number of those individuals."

34. Acting upon the basis of the complaints, the Commission found "reason to believe" that ACPA and Robert E. Dolan, as Treasurer, violated 2 U.S.C. § 438(a)(4), a provision of the Act, and initiated an investigation into that apparent violation. ACPA and Dolan were notified of the Commission's actions by letters dated March 2, 1987, and July 22, 1987. *See* 2 U.S.C. § 437g(a)(2).

35. Acting upon the basis of information received in the normal course of carrying out its statutory duties, the Commission found "reason to believe" that IFI violated 2 U.S.C. § 438(a)(4), a provision of the Act, and initiated an investigation into that apparent violation. IFI was notified of the Commission's actions by letter dated April 12, 1990. *See* 2 U.S.C. § 437g(a)(2).

36. The Commission's General Counsel notified IFI, ACPA, and Robert E. Dolan, as Treasurer of ACPA, by letters dated February 9, 1990, that the General Counsel was prepared to recommend that the Commission find "probable cause to believe" defendants violated 2 U.S.C. § 438(a)(4). Enclosed with the letters were briefs stating the position of the General Counsel on the factual and legal issues of the case. *See* 2 U.S.C. § 437g(a)(3).

37. On April 3, 1990, the Commission found "probable cause to believe" that IFI, ACPA, and Robert E. Dolan, as Treasurer of ACPA, had knowingly and willfully violated 2 U.S.C. § 438(a)(4). IFI, ACPA, and Dolan were notified of the Commission's actions by letters dated April 9, 1990. Thereafter, the Commission attempted for a period of not less than 30 days to correct such violations by the informal methods of conference, conciliation, and per-

suasion, and to enter into a conciliation agreement with IFI, ACPA, and Dolan. *See* 2 U.S.C. § 437g(a)(4)(A)(i).

Judicial Proceedings

38. On March 9, 1990, Dolan brought suit against the Commission (Civ. No. 90-0542(RCL)) under 2 U.S.C. § 437h, and on May 8, 1990, the Commission filed its answer.

39. On July 13, 1990, the Commission filed suit in the present action against IFI, ACPA, and Dolan, as Treasurer. On August 3, 1990, in lieu of filing an answer, IFI, ACPA, and Dolan submitted a motion to dismiss.

40. At a status conference on August 22, 1990, Dolan voluntarily dismissed his section 437h action against the Commission. At the same time, the parties agreed that the Commission would amend its complaint in the present case to include a request for certification under 2 U.S.C. § 437h, and that the Commission would submit a motion to certify, proposed issues for certification, and proposed findings of fact, all pursuant to 2 U.S.C. § 437h.

December 21, 1990
Date

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Copies to:

V. Colleen Miller
Office of the General Counsel
FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

and

David M. Kopstein, Esq.
DROSS & KOPSTEIN
1825 Eye Street, N.W.
Suite 1201
Washington, D.C. 20006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 90-1623
(RCL)

FEDERAL ELECTION COMMISSION,

Plaintiff,

v.

INTERNATIONAL FUNDING INSTITUTE, INC. et al.,
Defendants.

FILED

OCT 23 1991

Clerk, U.S. District Court
District of Columbia

MEMORANDUM OPINION AND ORDER

Plaintiff Federal Election Commission ("FEC") brought this civil enforcement action seeking declaratory and injunctive relief and civil penalties against a political consulting firm, a political action committee, and the sole shareholder of each for violations of 2 U.S.C. § 438(a)(4) of the Federal Election Campaign Act of 1971 ("FECA"). *See* 2 U.S.C. §§ 431-455 (1988). On August 6, 1990, defendants moved to dismiss the complaint under Rule 12(b)(6) for failure to state a claim. Defendants alleged that § 438(a)(4) of FECA violates the First Amendment and thus cannot serve as a basis of an enforcement action against them.

The FEC responded by moving for this court to certify the question of the constitutionality of § 438(a)(4) to the

court of appeals, as the FEC is permitted under 2 U.S.C. § 437h. Section 437h is an extraordinary provision that permits expedited judicial review when the constitutionality of FECA is at issue. Under § 437h,

> The Commission, the national committee of any political party, or any individual eligible to vote in any election for the office of the President may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this Act. The district court immediately shall certify all questions of constitutionality of this Act to the United States court of appeals for the circuit involved, which shall hear the matter sitting en banc.

2 U.S.C. § 437h (1988)

The FEC's motion also included proposed questions for certification and proposed findings of fact for the district court to certify to the court of appeals.

Defendants renewed their motion to dismiss and argued that the district court should certify as a question for the court of appeals only the constitutionality of the statute as applied to the facts alleged in the FEC's amended complaint; as such, the district court would not need to make findings of fact. Defendants stated that, because they had filed a Rule 12(b)(6) motion to dismiss, "issue has not been joined with respect to any of the facts alleged." *See* Def. Mot. Alter or Amend Certification Order at 2. Defendants made no objections to the FEC's proposed findings of fact.

By order dated December 21, 1990, filed on January 25, 1991, this court certified both the facial and as-applied constitutionality of § 438(a)(4) to the court of appeals. Included in this certification were the findings of fact "proposed by plaintiff and substantively unopposed by the

defendants." Order of Jan. 25, 1991. Defendants now ask the court to alter its order certifying the question to the court of appeals under § 437h by deleting the finding of facts from the order.

Analysis

Defendants argue that the court should not have included findings of fact because the issue of whether the FEC's amended complaint states a claim on which relief may be granted is a sufficient constitutional question to certify to the court of appeals and because the factual issues were never joined. Defendants maintain that, because their Rule 12(b)(6) motion is pending and they have not answered the complaint, this court could not certify findings of fact to the court of appeals.[1]

According to defendants' theory, the motion to dismiss transmogrifies the procedural posture of the case, apparently overriding the mandates of § 437h as interpreted by the Supreme Court. *See Bread Political Action Committee v. FEC*, 455 U.S. 577 (1982); *California Medical Ass'n v. FEC*, 453 U.S. 182 (1981). Normally, district judges who certify questions under § 437h to the court of appeals must make findings of fact. *See Bread*, 455 U.S.. at 580 ("On remand, the District Court, as required by § 437h, first made findings of fact and then certified the case back to the Court of Appeals sitting en banc for a determination on the constitutional questions raised by the appellants."). This factual record sharpens the constitutional issues which

---

[1] The FEC argues that this court no longer has jurisdiction over the case because it has certified questions to the court of appeals which now has original jurisdiction. *See International Ass'n of Machinists & Aerospace Workers v. FEC*, 678 F.2d 1092, 1095 n.3 (D.C. Cir. 1982) (en banc), *aff'd* 459 U.S. 983. The court assumes, but does not decide, that the defendants could seek a remand to this court from the court of appeals if the this court were inclined to grant its motion to alter the certification order. *See, e.g., Pioneer Ins. Co. v. Bates*, 558 F.2d 1303 (8th Cir. 1977); *see also Smith v. Pollin*, 194 F.2d 349 (D.C.Cir. 1952).

the court of appeals will consider en banc. *See Anderson v. FEC*, 634 F.2d 3, 5 (1st Cir. 1980) (remanding for more factual development). Defendants argue, however, that the Federal Rules of Civil Procedure permit defendants to await a decision on their motion to dismiss before answering the factual allegations in the FEC's complaint. *See* Fed.R.Civ.P. Rule 12(a). Thus, conclude defendants, because the court has not ruled on the motion to dismiss, the defendants need not respond to the factual allegations and the court cannot make findings of fact for the certification. The only question that the district court could then certify was whether the amended complaint states a claim.

Defendants are correct that the interplay between a rule 12(b)(6) motion to dismiss and the certification procedures under § 437h is an issue of first impression. Nonetheless, defendants' premise that a motion to dismiss for failure to state a claim fundamentally alters the certification process is faulty. Section 437h is an extraordinary statute, designed by Congress to expedite judicial review of cases involving the constitutionality of FECA by radically altering the normal course of a lawsuit.[2] The statute's requirement that the district court "immediately" certify the question to the en banc court of appeals disrupts the normal rules of civil procedure. When invoked by an appropriate party, § 437h transmogrifies the procedural posture of the case. Under these extraordinary procedures, the

---

[2] When he introduced this section during consideration of the 1974 Federal Election Campaign Act Amendments, Senator Buckley stated:

> It merely provides for the expeditious review of the constitutional questions I have raised. I am sure we will all agree that if, in fact, there is a serious question as to the constitutionality of this legislation, it is in the interest of everyone to have the question determined by the Supreme Court at the earliest possible time.

120 Cong. Rec. 10562 (1974).

district judge generally does (and perhaps is required to) certify findings of fact to the court of appeals.

Defendants claim that they "never had the opportunity to file an answer admitting or denying the Commission's allegations." Def. Reply Mem. at 5. This statement is completely incorrect. By seeking certification and proposing a set of facts, the FEC put the facts in issue. Regardless of defendants' motion to dismiss, the procedures under § 437h, which generally require the district court to send facts with the certified questions,[3] required the defendants to either respond with their version of the facts or with objections to the FEC's proposed facts. The prior motion to dismiss does not excuse their failure to argue the facts when they should have done so. It is immaterial that the defendants had not yet contested the factual allegations of the complaint. Once § 437h was invoked, the facts which the court would certify to the court of appeals were at issue.

Rather than argue the facts, defendants appear to have made a strategic decision to oppose the motion for certification as presented by the FEC solely by arguing that the court need not make findings of fact. By apparently assuming that they would succeed on this ground, they failed to prepare for losing this issue by propounding a different version of the facts. They could have argued, in the alternative, for a different set of facts; they could have requested an evidentiary hearing; they could have stated that they reserved the right to dispute the facts after the court decided whether to certify a finding of fact; they

---

[3] Even if the defendants are correct in their assertion that the district court need not certify findings of fact, this court, following briefing and argument by both sides, has chosen to certify such findings. Defendants should have been prepared that the court would reject its argument and elect to makes findings of fact. Indeed, defendants have cited no case where a district court has not certified findings of fact to the court of appeals.

could have moved for the court to decide on the motion to dismiss before certifying the case to the court of appeals.[4] Defendants did none of these things, nor indicated in any way that they disagreed with the set of facts proposed by the FEC.

In this situation, with the facts clearly at issue, the court could only assume that the defendant objected to the idea of findings of fact, but not to the actual findings proposed by the FEC. Having waived any objection, either through deliberate strategy or inadvertence, the defendants cannot now demand that the court alter its certification. For the foregoing reasons, defendants' motion to alter or amend the certification order is hereby DENIED.

/s/ Royce C. Lamberth
Royce C. Lamberth
United States District Judge

Date: OCT 23 1991

---

[4] Defendants' motion to dismiss argued that the FEC's complaint failed to state a claim because it was unconstitutional. Had this court decided the motion to dismiss first, in the face of a motion for certification, the district court would be violating Congress' clear intent to use the certification procedures under § 437h to determine the constitutionality of sections of the FECA. As such, this court could not permit the motion to dismiss to be used as a pre-emptive strike to suborn Congress' express will.

2 U.S.C. § 438. Administrative provisions

(a) Duties of Commission

The Commission shall—

* * *

(4) within 48 hours after the time of the receipt by the Commission of reports and statements filed with it, make them available for public inspection, and copying, at the expense of the person requesting such copying, except that any information copied from such reports or statements may not be sold or used by any person for the purpose of soliciting contributions or for commercial purposes, other than using the name and address of any political committee to solicit contributions from such committee. A political committee may submit 10 pseudonyms on each report filed in order to protect against the illegal use of names and addresses of contributors, provided such committee attaches a list of such pseudonyms to the appropriate report. The Clerk, Secretary, or the Commission shall exclude these lists from the public record;